

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98B134

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT D. BROWN,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on July 20 and August 4, 1998. Respondent was represented by Diane Marie Michaud, Assistant Attorney General.

Complainant appeared and was represented by James R. Gilsdorf, Attorney at Law.

Respondent presented four witnesses: William Bell, Criminal Investigator; Jacqueline Grant, Plant Supervisor I; Tom Crago, former Director of Correctional Industries, Department of Corrections; and Thomas Gitzen, Federal Express Courier (by telephone from Canon City).

Complainant testified in his own behalf and called no other witnesses.

The witnesses were sequestered upon complainant's motion. Excepted from the sequestration order were complainant and respondent's advisory witness, Tom Crago.

Respondent's Exhibits 1, 2, 4, 5, 6, 7, 11, 13, 14 and 19 were

stipulated into evidence. Exhibits 3, 9, 10, 12 and 20 were admitted without objection. Exhibits 8, 15, 17 and 18 were admitted over objection.

Complainant offered no exhibits.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment. For the reasons set forth herein, a disciplinary suspension is substituted for the dismissal.

ISSUES

1. Whether complainant committed the acts for which discipline was imposed;
2. Whether the discipline imposed was within the range of available alternatives;
3. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
4. Whether the predisciplinary meeting was properly conducted;
5. Whether the discipline was imposed by a properly delegated appointing authority;
6. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant Robert D. Brown began employment with respondent Division of Correctional Industries of the Department of Corrections (DOC) in March 1991. In July 1996, in the capacity of Production Supervisor I, Brown became the effective manager of the computer production department.

2. At the computer services shop, located just outside of the fence at Arrowhead Correctional Facility in Canon City, computers are built, repaired and upgraded primarily with inmate labor. The computers are sold to state agencies and state employees at a profit.

3. In June 1997, the computer shop was relocated to what had been the taco shop. Complainant inherited the taco shop's inmate work crew, headed by inmate Roger Randolph. The inmates continued following work procedures that were in place at the taco shop.

4. Complainant supervised thirteen to sixteen inmates and, for the most part, was the only staff member on-site. His supervisor was there infrequently. He would see his supervisor two or three times per week. Other staff members were there occasionally during a few-month period after the move to the taco plant.

5. Jackie Grant was assigned to the computer shop in late July 1997 as a DOC staff member to assist complainant in the operation of the business. Her job required some travel and she was not

always on-site.¹

6. Inmate Randolph was the receptionist/clerk. He carried a cordless telephone with him at all times during the day and fielded the majority of the incoming phone calls, of which there might be as many as 100 in a day, mostly from customers. He held this position prior to coming under the supervision of complainant. The cordless telephone was unsecured, meaning that calls could be made to anywhere outside the facility. The calls did not go through a switchboard and were not monitored. Randolph and the other inmates were instructed by complainant that all telephone calls made from the computer shop must be work-related and that personal calls were not permitted.

¹Grant now holds the title of Plant Supervisor I and supervises two production supervisors and thirteen inmates at the computer services shop.

7. Randolph was the highest paid inmate.² He had spent most of his life in prison. Some of his convictions involved theft. The testimony did not reveal his age.

8. In August 1997, the DOC investigations unit began receiving information that drugs were being brought into the correctional facilities through the computer services building. The information obtained was that a woman in Montrose shipped marijuana via Federal Express to the computer services shop addressed to complainant. She communicated by telephone with Randolph.

9. Investigator Bell requested of the Federal Express courier that he be notified if any suspicious packages were sent to complainant.

10. In November 1997, Courier Thomas Gitzen notified Investigator Bell of a suspicious package addressed to complainant. The air bill was handwritten and the charge was paid in cash, both unusual for a computer company to do. Additionally, two different addresses for the delivery were shown on the package, the computer services building being the first one. The courier made arrangements to meet the investigator at the facility the following day.

11. DOC set up a surveillance operation, and the package was delivered on November 5, 1997. When Courier Gitzen entered the building, two inmates attempted to retrieve the package from him.

²The inmate pay scale ranges from \$.25 to \$2.50 per day. Computer shop employees also receive a bonus based upon production. Randolph was paid at the highest level.

He bypassed them and went to complainant's second floor office, the package under his arm. He handed the air bill to complainant on a clipboard, and complainant signed for the delivery. An inmate then took the package and left.

12. A surveillance camera depicted Randolph removing bags of marijuana from the box that just been delivered. Investigators moved in and seized one-half pound of marijuana.

13. Investigator Bell interviewed complainant, Randolph and other inmates on the day of the drug bust. Inmates Randolph and Brian Roberts, the inventory clerk and a co-conspirator in bringing drugs into the facility, did not implicate anyone else in the illegal drug activity. Complainant denied having any involvement with drugs. He admitted signing for the package but did not know what it contained or what happened to it.

14. Complainant was the DOC staff member responsible for the supervision of all inmates in the computer shop on November 5. No other staff member was present.

15. All inmates were removed from the computer shop for the rest of November and all of December.

16. In subsequent interviews, inmates Randolph and Roberts implicated complainant in the theft of computers. Randolph stated to the investigator that when he asked complainant why he could not take a computer, complainant replied: "Go ahead and take one." Complainant added that it was up to Randolph to "get it out of the building."

17. Complainant testified that he did not recall making the above

statements, but if he did, it was mere "trash talk," meaning not serious.

18. In October 1997, prior to the drug bust, complainant granted Randolph's request to use the telephone to call his impending parole officer. This is in violation of DOC policy in that the inmate should not have called the parole officer directly but rather should have gone through his DOC case manager. The call angered the parole officer and he telephoned complainant to express his anger. Randolph was removed from his job, and a penal disciplinary hearing was held. Complainant let it be known that he had authorized Randolph's telephone call. Randolph's job and telephone privileges were restored because complainant had given him permission to make the call. (Exhibits 6, 7.) Between Thursday, October 16 and Tuesday, October 21, Randolph missed three full days of work.

19. Grant and complainant discussed Randolph's use of the phone and agreed that it would be better if another inmate besides Randolph were assigned to the shop telephone duties, and this was done.

20. On Monday, November 1, returning from having been on annual leave the final week of October, complainant, as an oversight, signed the October pay sheet authorizing payment to Randolph for the entire month, inclusive of the days that he did not, in fact, work.

21. Packages were occasionally sent directly to Grant or complainant at the computer shop. Grant testified that when a package was addressed to her, she was the one who opened it. Generally, when packages came in, inmates, usually inmate Roberts,

opened them and removed the contents. The approved policy was that a staff member would monitor the opening, but in the absence of a staff member, inmates would open the package as soon as it came in.

22. Grant was troubled over the lack of security at the shop, particularly that inmates were not supervised while on the shop floor. She discussed her concerns with Bill Lopez, the supervisor of both she and complainant. Lopez also was concerned. No action was taken by either of them to make the area more secure, except that Grant was supposed to help out complainant, who was by himself most of the time in terms of supervision of the inmates.

23. Two or three computers were stolen from the computer shop.

24. Complainant was known to deliver computers to customers in his personal vehicle from time to time.

25. Neither Grant nor complainant had any prior knowledge of drug activity on the premises and neither was involved in either drug smuggling or the theft of computers.

26. Canned air is compressed air which is used to blow dust and small particles off of computers and parts. Canned air is combustible and is not allowed in most DOC facilities. On one occasion, a box of canned air arrived at the shop. Complainant open it and, knowing that canned air was prohibited, set the package aside, where inmates would have access to it.

27. Complainant approved the policy of giving used computer parts to customers if the parts were of no use to the shop and a profit could not be turned by selling them. He considered giving away such items to someone who had a use for them was good public

relations.

28. Bell interviewed complainant again in February 1998. The interview covered Randolph's use of the unsecured telephone and alleged computer theft.

29. The general DOC policy with respect to inmate telephone calls is that the calls are restricted and monitored. As to inmate mail, incoming letters are screened before being delivered to the inmate except for letters from an attorney, which are opened in the inmate's presence and are not censored. There was no specific DOC policy preventing supervisors from allowing inmates to open packages in the computer shop.

30. Tom Crago, Divisional Director of Correctional Industries from 1991 to 1998, was delegated the appointing authority in the matter of complainant on February 27, 1998. (Exhibits 9, 10.)

31. Crago scheduled a predisciplinary meeting with complainant because: "Information has recently come to my attention which indicates that you may have known about, assisted, and/or allowed inmates to bring drugs into the computer shop. Information also indicates you may have improperly paid inmates even though they did not come to work. Finally, I have information which indicates you may have authorized, encouraged, and/or condoned inmate thefts of computers, as well as allegations that you may have improperly removed computer parts and computers for yourself and others." (Exhibit 1.³)

32. The R8-3-3 meeting, attended by Crago, complainant, Director

³The notice letter is incorrectly dated February 9, 1998. The correct date is March 9, 1998.

of DOC Legal Services Brad Rockwell and CAPE representative Jim Peasley, was held on March 19, 1998. In making the disciplinary decision, Crago gave primary weight to the R8-3-3 meeting.

33. The allegation of giving away parts was mitigated, in Crago's view, by complainant's statement that his supervisor had told him to do this to promote good will.

34. Crago considered the allegations of drugs coming in and computers leaving the facility to be extremely serious. Less serious was the payroll allegation.

35. Crago found out about inmate access to the computer shop telephone during the meeting. It had not been listed as an issue to be addressed.

36. The issue of the canned air came up at the meeting. There was some reason to believe that there may have been drugs in the box, which complainant did not see when he opened it. Crago's main concern was that canned air was contraband, and complainant merely pushed it aside.

37. Crago did not believe that complainant authorized only one outside telephone call by an inmate (Randolph). Rather, Crago concluded that complainant knew that inmates were using the computer shop telephone to make outside calls.

38. Crago concluded that complainant's statements to Randolph were more than "trash talk" and that they amounted to "tacit approval" of computer theft.

39. Before making his decision, Crago listened to the audio tape

recording of the meeting and reviewed complainant's performance record. Complainant's most recent evaluation was "good." There were no prior corrective or disciplinary actions.

40. In deciding on termination as the appropriate discipline, Crago was especially influenced by the fact that drugs came into the building, inmates were allowed to open packages, contraband in the form of canned air came in and complainant just pushed it aside, and complainant's statements to Randolph of, "Go ahead and take one" and that Randolph had to "get it out of the building" were tantamount to approving inmate theft of computers.

41. Crago concluded that complainant's actions assisted inmates in bringing drugs into the facility in violation of DOC Administrative Regulation (AR) 1450-1, IV. M., which prohibits "introduction of any item of contraband" into DOC facilities. He concluded that complainant's act of overpaying an inmate violated AR 1450-1, IV. CC, which provides: There is an obligation to be accountable and efficient in the use of state resources." Crago believed that complainant's "trash talk" statements also violated AR 1450-1, IV. CC. (See Exhibit 4, AR 1450-1.)

42. Crago concluded that complainant did not remove computers or computer parts for his own benefit, but he did give parts away to some customers, and that issue would be addressed in a separate corrective action, apart from the disciplinary action.

43. By letter dated March 31, 1998, the appointing authority terminated the employment of Robert D. Brown for failure to comply with standards of efficient service and willful violation of DOC Administrative Regulations. (Exhibit 2.)

44. Complainant filed a timely appeal of the disciplinary action on April 3, 1998.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

The State Personnel Board may reverse or modify respondent's action only if such action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S. In determining whether an administrative agency's decision is arbitrary or capricious, the administrative law judge must determine whether a reasonable person, considering all the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. *Ramseyer v. Colorado Department of Social Services*, 895 P.2d 506 (Colo. App. 1992).

The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987). The fact finder is entitled to accept parts of a witness's testimony and reject other parts. *United States v. Cueto*, 628 F.2d 1273, 1275 (10th Cir. 1980). The fact finder can believe all, part or none of a witness's testimony, even if uncontroverted. *In re Marriage of Bowles*, 916 P.2d 615, 617 (Colo. App. 1995).

It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the

burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995). The preponderance of the evidence standard, as used in this administrative proceeding, requires the fact finder to be convinced that the factual conclusion he chooses is more likely than not. Koch, *Administrative Law and Practice*, Vol. I at 491 (1985).

Respondent presented a great deal of irrelevant evidence pertaining to the drug bust and computer theft that did not implicate complainant or relate to his individual conduct. No credible evidence was offered to prove that complainant was involved in any manner in drug smuggling or computer theft, although the investigator had suspicions of complainant's involvement early on in the investigation. Complainant's acts or omissions may have been naive, but they were not willful.

Investigator Bell testified that, during the November 5 interview, complainant denied letting Randolph use the telephone and later changed his mind. Complainant testified that he did change his story. The appointing authority, influenced by the alleged contradiction by complainant, concluded that complainant was not being straightforward regarding inmates' use of the phone. Yet, the evidence supports complainant's account of events. It does not make sense that he would deny giving permission to Randolph in November when he openly admitted in October that he authorized the personal call. In fact, his admission was the reason for Randolph prevailing and returning to his job.

The appointing authority acted in part on a belief that complainant admitted saying "forget about it" to inmates in reference to the theft of two computers. The record fails to substantiate the appointing authority's conclusion.

In context, the appointing authority's conclusion that complainant gave "tacit approval" to the theft of computers is ludicrous. In the first place, the inmates did not need, and sensibly would not seek complainant's permission to steal. There is absolutely no evidence that complainant provided any assistance whatsoever to an inmate to steal a computer. As a practical matter, Randolph could figure out for himself that he had to get the computer out of the building and did not need complainant's advice. Randolph had spent most of his life in prison, some of his convictions being for theft, and he was known to be savvy and manipulative. Complainant testified logically that he often responded to inmate comments in the workplace in the manner they were offered, *i.e.*, "trash talk." His entire work crew consisted of inmates, and he learned to function in such an environment. At the same time, instruction or counseling as to appropriate conversation or proper communication with inmates may be in order.

The issue of paying Randolph for three days not worked was overblown in importance. The letter advising complainant of the predisciplinary meeting (Exhibit 1) referenced more than one inmate being improperly paid, yet there was never information that pointed to anyone except Randolph. Complainant admitted to the oversight.

The amount of money is minimal in terms of state resources, the subject of AR 1450-1 IV. CC., approximately \$18.00. There is no evidence that complainant intended to defraud the state. An inmate clerk prepared the pay sheet and complainant signed it. He testified that Randolph probably would have gotten paid, anyway, because the DOC practice is to pay inmates if their failure to report for work is through no fault of their own. Be that as it may, it is not the reason he authorized the payment. He made a mistake by not remembering that Randolph missed three days of work

between October 16 and 21 when he signed the monthly payroll sheet which he did not prepare. An act or omission such as this does not rise to the level of "so flagrant or serious" as to justify immediate disciplinary action. R8-3-1(C), 4 Code Colo. Reg. 801-1.

The paramount issue in this case is the breach of security that enabled marijuana to be smuggled into a DOC facility. Security was so lax as to border on ridiculous. Complainant's supervisor knew it, and Jackie Grant knew it. Although the lax security was not a reality necessarily created by complainant, marijuana was imported on his watch. The function of DOC is to provide security. No matter how busy he happened to be, common sense should have compelled complainant to personally inspect a package addressed to him.

Even though canned air was technically contraband, there is no evidence that any inmate had a use for it or used it in any manner. The issue here is drugs, and there is no reasonable excuse for marijuana being smuggled in like it was. Notwithstanding that his actions or inactions were not willful in the sense of intentionally allowing drugs into the building, complainant's negligence was so flagrant or serious as to warrant immediate disciplinary action short of termination.

Pursuant to Rule 8-3-4(A)(1), 4 Code Colo. Reg. 801-1, a disciplinary suspension to the date of this decision is substituted for the dismissal. The period of suspension may not exceed 135 days. *Rose v. Department of Institutions*, 826 P.2d 379 (Colo. App. 1991). This decision presumes that complainant is a non-exempt employee as defined by the Fair Labor Standards Act and that the order consequently is in compliance with Rule R8-3-3(A)(1), 4 Code Colo. Reg. 801-1. Evidence on this subject was not introduced at

hearing.

Complainant did not proffer any evidence tending to show that the predisciplinary meeting was improperly conducted or that the appointing authority was not properly delegated.

This is not an appropriate case for the award of attorney fees and costs under § 24-50-125.5, C.R.S., of the State Personnel System Act.

CONCLUSIONS OF LAW

1. Complainant committed some of the acts for which discipline was imposed.
2. The discipline imposed was not within the range of available alternatives.
3. Respondent's action was arbitrary, capricious or contrary to rule or law.

4. The predisciplinary meeting was properly conducted.
5. The discipline was imposed by a properly delegated appointing authority.
6. Neither party is entitled to an award of fees and costs.

ORDER

The disciplinary termination is rescinded. A disciplinary suspension is substituted from the date of termination through the date of this decision, not to exceed 135 days. Complainant shall be reinstated to his former position with full back pay and benefits except for the period of suspension and less any income he would not have earned or received but for the termination.

DATED this _____ day of
September, 1998, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel

Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record must make arrangements with a disinterested recognized transcriber to prepare the transcript. The party should advise the transcriber to contact the Board office to obtain the hearing tapes. In order to be certified as part of the record on appeal the original transcript must be submitted to the Board within 45 days of the date of the notice of appeal is filed. It is the responsibility of the party requesting a transcript to ensure that any transcript is timely filed. If you have any questions or desire any further information contact the State Personnel Board office at (303) 866-3244.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of September, 1998, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf
Attorney at Law

1390 Logan Street, Suite 402
Denver, CO 80203

and in the interagency mail, addressed as follows:

Diane Marie Michaud
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
